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87-233

Supreme Court, U.S.
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1986-87 TERM

IN THE SUPREME COURT OF THE UNITED STATES

SUPREME COURT NUMBER _____

ANDREW WILSON HAYES,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA NO. 85-1105

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE LACK OF A PROPER INDICTMENT UNDER STATE LAW BECAUSE OF VIOLATION OF STATE GRAND JURY SECRECY REQUIREMENTS AND OF STATE PROSCRIPTIONS AGAINST THE PROSECUTOR'S PRESENCE DURING GRAND JURY VOTING DEPRIVE THE PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

II. DID THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION SEEKING TO QUESTION MEMBERS OF THE GRAND JURY REGARDING ALLEGED IMPROPRIETIES SURROUNDING THE PRESENTATION OF THE CASE TO THE GRAND JURY DEPRIVE THE PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE A GRAND JURY VOTE WAS TAKEN IN OPEN

COURT IN THE PRESENCE OF THE PROSECUTOR IN CONTRAVENTION OF STATE LAW?

III. IS A PROCEDURE WHEREBY A STATE, CONTRARY TO ITS OWN STATUTORY PROSCRIPTION AGAINST THE PRESENCE OF THE PROSECUTOR DURING A VOTE OF THE GRAND JURY AND AGAINST ITS OWN STATUTE PROSCRIBING A PUBLIC VOTE ON THE RETURN OF AN INDICTMENT BY THE GRAND JURORS, ALLOWS GRAND JURORS TO CONDUCT A VOTE IN OPEN COURT IN THE PRESENCE OF THE PROSECUTOR VIOLATIVE OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND TO DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

IV. CAN A DEFENDANT, CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE 14th AMENDMENT AND CONSISTENT WITH HIS RIGHT TO A FAIR TRIAL UNDER U.S. CONST. AMEND. VI AND AMEND. XIV, WAIVE A REQUIRED

STATE STATUTORY PROCEDURE OF INDICTMENT BY A GRAND JURY WHICH VOTES IN SECRET AND DURING WHICH VOTE, THE PRESENCE OF THE PROSECUTOR IS PROSCRIBED?

LIST OF PARTIES

The parties to this proceeding are Andrew Wilson Hayes and the State of Alabama.

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OPINIONS DELIVERED IN COURTS BELOW

The affirmance of Petitioner's conviction by the Court of Criminal Appeals of Alabama is reported as Hayes v. State, 507 So.2d 982 (Ala. Cr. App. 1986). The Alabama Supreme Court granted certiorari but quashed the writ as improvidently granted, four justices dissenting in a per curiam opinion, Ex parte Hayes, 507 So.2d 995 (Ala. 1987). The Alabama Supreme Court denied rehearing without opinion. 507 So.2d 995 (Ala. 1987). These opinions are set forth in their entirety infra in the Appendix.

GROUNDS UPON WHICH SUPREME COURT JURISDICTION IS INVOKED

The statutory provision which confers upon this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. § 1257(3), which provides that judgments

or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari, where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION
AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CODE OF ALABAMA, 1975 § 8-6-2(10)

SECURITY. Any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share,

of the foregoing or any instrument of any kind commonly known as a security.

CODE OF ALABAMA, 1975, § 8-6-17(1)

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly, to:

(1) Employ any device, scheme or artifice to defraud;

CODE OF ALABAMA, 1975, § 12-16-209

Attendance and duties of district attorney before grand jury generally; district attorney not to be present at expression of opinions or giving of votes by grand jury.

The district attorney must attend before the grand jury when required by them, and he may do so whenever he sees fit for the purpose of examining witnesses in their presence or giving them

investment contract, voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, annuity contract unless issued by an insurance company, bankers' shares, trustees' shares, investment participating bonds, investment trust debentures, units, shares, bonds and certificates in, for, respecting or based upon any form of securities or collateral, subscriptions and contracts covering or pertaining to the sale or purchase on the installment plan of any security as herein defined, or subscription or contracts covering or pertaining to the sale or purchase of beneficial interest in title to property, profits or earnings, or any right to subscribe to any

legal advice as to any matter connected with their duties; and he may appear before them at any time to give information as to any matter cognizable by them, but he must not be present at the expression of their opinions or the giving of their vote on any matter before them. (Code 1852, § 52; Code 1867, § 4102; Code 1876, § 4775; Code 1886, § 4359; Code 1896, § 5045; Code 1907, §7306; Code 1923, § 8688; Code 1940, T. 30, § 94.)

CODE OF ALABAMA, 1975, § 12-16-214

Legislative findings; desirability of secrecy.

The legislature hereby finds, declares and determines that it is essential to the fair and impartial administration of justice that all grand jury proceedings be secret and that the secrecy of such proceedings

remain inviolate. The provisions of this division are to be construed for the accomplishment of this purpose and to promote the following:

(1) That grand juries have the utmost freedom in their discussions, deliberations, considerations, debates, opinions and votes without fear or apprehension that the same may be subsequently disclosed, or that may be subject to outside pressure or influence or injury in their person or property as a result thereof.

(2) That those persons who have information or knowledge with respect to the commission of crimes or criminal acts be encouraged to testify freely and truthfully before an appropriate grand jury without fear or apprehension that their testimony may be subsequently disclosed, or that they may be subject

to injury in their person or property as a result thereof.

(3) That those persons who have committed criminal acts or whose indictment may be contemplated not escape or flee from the due administration of justice.

(4) That those persons falsely accused of criminal acts are not subject to public scrutiny or display and their otherwise good names and reputations are left intact. (Acts 1979 No. 79-457, p. 745, § 1.)

CODE OF ALABAMA, 1975 § 15-15-21

Information preferred and filed against defendant.

When the desire of a defendant to plead guilty is made known to the court, it shall direct the district attorney of such court to prefer and

file an information against such defendant, under the oath of such district attorney or some witness, which information shall accuse the defendant, the same certainty as an indictment, of the criminal offense for which he is being held. (Acts 1939, No. 227 p. 367; Code 1940 T. 15, § 261.)

CONSTITUTION OF ALABAMA OF 1901
ART. I, § 8

Proceeding against person by information; grand jury not required in misdemeanor cases

That no person shall, for any indictable offense, be proceeded against criminally, by information, except in cases arising in the militia and volunteer forces when in actual service or when assembled under arms as a military organization, or, by leave of the court, for misfeasance,

misdemeanor, extortion, and oppression in office, otherwise than is provided in the Constitution; provided, that in cases of misdemeanor, the legislature may by law dispense with a grand jury and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established.

CONSTITUTION OF ALABAMA OF 1901
AMENDMENT NO. 37
AMENDMENT OF SECTION 8.

Sec 8. Proceeding against person by information; grand jury not required in misdemeanor cases; plea of guilty prior to indictment.

No person shall for any indictable offense be proceeded against criminally by information, except in cases arising in the militia and volunteer forces when in actual service, or when

assembled under arms as a military organization, or, by leave of the court, for misfeasance, misdemeanor, extortion and oppression in office, otherwise than is provided in the Constitution; provided, that in cases of misdemeanor, the legislature may be law dispense with a grand jury and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established. Provided further that in all felony cases, except those punishable by capital punishment, the legislature may by law dispense with a grand jury and authorize such prosecutions and proceedings in such manner as may be provided by law if the defendant, after having had the advice of counsel of his choice or in the event he is unable to employ counsel, the

advice of counsel which must be appointed by the court, makes known in open court to a judge of a court having jurisdiction of the offense that he desires to plead guilty, provided, however, the defendant cannot plead guilty within fifteen days after his arrest.

STATEMENT OF THE CASE

Andrew Wilson Hayes was purportedly indicted in Baldwin County, Alabama, in five (5) counts of a nineteen (19) count indictment charging him and a co-defendant, Thomas H. Redmond, with various violations of Alabama Securities Law, § 8-6-17(1). Hayes was convicted of two counts in which it was alleged that he did, in connection with the offer, purchase or sale of a security, to-wit: a $10,000.00 surplus note of Southern Heritage Life Insurance Company issued to George Bolar (Count 17) and a $42,000.00 surplus note issued to Grace Magnor (Count 19), employ a device, scheme or artifice to defraud George Bolar (Count 17) and Grace Magnor (Count 19) by causing the surplus notes to be issued knowing that the Insurance Department of the State of Alabama had

revoked the certificate of authority of said Southern Heritage Life Insurance Company. (R. 1092). Hayes was convicted, sentenced to five (5) year concurrent sentences and ordered to make restitution. (R. 1040, R.R. 10).

Prior to trial, Hayes moved to dismiss the indictment on the ground that irregularities surrounded the presentation of the case to the Grand Jury. (R. 1101). This motion was denied after a hearing at which the trial judge denied the defense request to all members of the Grand Jury for testimony, regarding the alleged improprieties. (R. 01-09, Supplemental Transcript A). Because there was no record of this hearing, the parties entered into a stipulation on appeal so that this cause could be addressed. (R.01-09).

During the presentation of the

case to the Grand Jury, the State utilized two forms of indictment, one charging only the co-defendant, Thomas H. Redmond, and one charging both Redmond and Hayes. (Supplemental Transcript A, R.-01). The foreman of the Grand Jury signed the form charging only the co-defendant, Redmond. (R-03). The prosecutor brought this fact to the attention of the presiding judge, after which the judge convened all members of the Grand Jury in his courtroom and determined that the foreman of the Grand Jury, Mrs. Northcutt, had mistakenly signed the wrong indictment. (R.-04). In the presence of the presiding judge, Judge Wilters, and in the presence of the prosecutor, Robinson, the prosecutor asked all members of the Grand Jury if they had intended to indict both Hayes and Redmond, to which each responded

affirmatively. (R. -04).

Having been informed by his client that the above procedure with the Grand Jury had occurred, defense counsel moved to dismiss the indictment on the ground that certain improprieties surrounded the presentation of the case to the Grand Jury. During the hearing on this motion, counsel attempted to elicit testimony from the foreperson of the Grand Jury and from the prosecutor regarding the manner in which the case was presented to the Grand Jury. The trial judge disallowed questioning along this line. (R. Transcript B). This questioning was particularly pertinent because Hayes was a former circuit judge and practicing attorney in Baldwin County, Alabama.

Hayes was convicted of violation of Alabama Securities Law, Code of

Alabama, 1975, § 8-6-17(1) in that he sold surplus notes on Southern Heritage Life Insurance Company to the two individuals as alleged. The esssential facts were that Hayes was the president of the company, that the company had had its certificate of authority revoked and could no longer sell insurance policies in the State of Alabama. (R. 497). This revocation was appealed and later dismissed by agreement. (R. 510). The company, at the time of the sale of the surplus notes, had a total of $248,381.00 in capital and surplus and $540,000.00 in borrowed surplus and according to Paul Raadt, the Chief Examiner of the Alabama Department of Insurance, was insolvent. (R. 121, 131). Hayes did not personally sell the notes to Mrs. Magnor and Mr. Bolar. This was done by Redmond. However, the notes sold to

Mrs. Magnor and Mr. Bolar bore the signature of Hayes as the president of the company. (R. 477). He also endorsed checks used to purchase the notes (R. 442) and purchased a cashier's check with proceeds of the funds with which the notes were purchased and negotiated this cashier's check at a Mobile bank. (R. 439).

The Alabama Court of Criminal Appeals affirmed Hayes' conviction, rejecting arguments made under Issue I, that it was prejudicial error and a violation of the defendant's right to due process of law under the Fourteenth Amendment to the United States Constitution for the trial court not to allow defense counsel to question members of the Grand Jury regarding alleged improprieties surrounding the presentation of the case to the Grand Jury. (Appendix,

infra, p. A-90). This issue was preserved below by trial counsel's pre-trial Motion to Dismiss and the trial court's rejection of his attempt to offer evidence on this issue. (Supplemental Transcript B).

The Court of Criminal Appeals also rejected the defendant's contention raised in Issue II that the defendant was denied a fair and impartial trial by the overall misconduct of the prosecution in presenting the case to the Grand Jury. He argued under this issue that the process was illegal because of a vote to indict in open Court in the presence of the prosecutor. (Appellant's Brief, p 23). This issue was preserved below by the Motion To Dismiss and by the trial court's rejection of counsel's attempt to offer evidence on this issue. (Supplemental Transcript B).

(Appendix, infra, p. A-90).

The Alabama Supreme Court quashed certiorari as improvidently granted without opinion. The dissenting opinion joined in by four justices points out that there were procedural violations which caused the indictment to be unsupportive of the conviction. (Grand Jury secrecy mandated by Code of Alabama, 1975, § 12-16-209, which the legislature has declared to be "essential to the fair and impartial administration of justice."). The Alabama Supreme Court also denied rehearing.

ARGUMENT

I. THE LACK OF A PROPER INDICTMENT UNDER STATE LAW BECAUSE OF A VIOLATION OF STATE GRAND JURY SECRECY REQUIREMENTS AND OF STATE LAW PROSCRIPTIONS AGAINST THE PRESENCE OF THE PROSECUTOR DURING GRAND JURY VOTING DEPRIVED THE PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Although there is no federal constitutional impediment to a state's dispensing entirely with the grand jury in state criminal prosecutions, Hurtado v. California, 110 U.S. 516 (1884); McNulty v. California, 149 U.S. 645 (1983); Davis v. Burke, 179 U.S. 399 (1900); Graham v. West Virginia, 224 U.S. 616 (1912); Lem Woon v. Oregon, 229 U.S. 586 (1913); Snyder v.

Massachussetts, 291 U.S. 97 (1934); the Due Process Clause of the Fourteenth Amendment may require the State, having once resorted to the grand jury procedure, to furnish an unbiased grand jury. Beck v. Washington, 369 U.S. 541 (1962); Lawn v. United States, 355 U.S. 339 (1958). The rule has been well established that indictments are not open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury. Costello v. United States, 350 U.S. 359 (1956).

The question before the Court is, however, not the sufficiency or competency of the evidence to indict but whether the State has violated this defendant's right to due process of law and to fundamental fairness by failing to abide by its own statutorily-mandated process requiring secrecy and the

absence of the prosecutor during voting by the Grand Jury. Many states and federal circuits have adopted a per se rule requiring the dismissal of an indictment where an unauthorized person was present.[1] Others require a showing of prejudice before the indictment is quashed.[2]

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[1]See, e.g. Blevins v. State, 68 Ala. 92 (1880); People v. Rojas, 2 Cal. App. 3d 767, 82 Cal. Rptr. 862 (1969); Rudd v. State, 310 So.2d 295 (Fla. 1975); People v. DiFalco, 44 N.Y.2d 482, 406 N.Y.S. 2d 279, 377 N.E.2d 732 (1978). Annotation, "Presence of Unauthorized Persons During State Grand Jury Proceedings As Affecting Indictment," 23 A.L.R. 4th 397 (1983).

[2]See, e.g., State v. Revere, 232 La. 184, 94 So.2d 25 (1957); Commonwealth v. Harris, 23, Mass. 584, (21 N. E. 409 (1919); State v. Hill, 88 N.M. 216, 539 P 2d 236 (1975); State v. Ringgold, 635 P.2d 626 (Okla. App. 1981); Annotation, "Presence of Unauthorized Persons During State Grand Jury Proceedings As Affecting Indictment," 23 A.L.R. 4th 397 (1983).

It is significant that Alabama has enacted a statute which precludes the presence of the prosecutor during grand jury voting. Code of Alabama, 1975, 12-16-209. The language of this statute is that the prosecutor "must not be present at the expression of their opinions or the giving of their votes, on any matter before them." The violation of this clearly mandatory language enacted by the Alabama legislature results in an indictment unsupportive of a conviction. Goulden v. State, 53 Ala.App. 278, 299 So.2d 323, aff'd, 292 Ala. 704, 299 So.2d 325 (1974).

Alabama has also enacted a statute which provides that "it is essential to the fair and impartial administration of justice that all grand jury proceedings be secret and that the secrecy of such proceedings remain inviolate."

Code of Alabama, 1975, § 12-16-214. A stated purpose of this requirement is that "grand juries have utmost freedom in their discussions, debates, opinions and votes without fear or apprehension that the same may be subsequently disclosed or that they may be subject to outside pressure or influence or injury in their person or property as a result thereof." Id.

The vote of the Grand Jury in open court in the presence of the prosecutor clearly violates these two statutes. Having mandated this procedure, the State is bound to follow it in order to provide its citizens due process and fundamental fairness. The secrecy statute itself recognizes that compliance therewith is essential to the fair and impartial administration of justice. [emphasis supplied]. The

presence of the prosecutor during a Grand Jury vote and the taking of the vote in open court was a clear violation of State law and violated this defendant's right to fundamental fairness under the Sixth and Fourteenth Amendments and to due process of law under the Fourteenth Amendment.

This Court has held on more than one occasion that a conviction upon a criminal charge not made is a denial of due process. DeJonge v. Oregon, 299 U.S. 353 (1937); Thornhill v. Alabama, 310 U.S. 88 (1940); Garner v. Louisiana, 368 U.S. 157 (1961). These cases turned primarily on convictions of defendants for crimes so devoid of evidentiary support as to violate due process. The Court should grant certiorari in this case to determine whether under considerations of fundamental

fairness and due process, a conviction can be supported by an indictment which was obtained in violation of State statutory requirements which are recognized by the State as being mandatory and essential to the fair and impartial administration of justice.

II. THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION SEEKING TO QUESTION MEMBERS OF THE GRAND JURY REGARDING ALLEGED IMPROPRIETIES SURROUNDING THE PRESENTATION OF THE CASE TO THE GRAND JURY DEPRIVED THE PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE A GRAND JURY VOTE WAS TAKEN IN OPEN COURT IN THE PRESENCE OF THE PROSECUTOR IN CONTRAVENTION OF STATE LAW.

Defense counsel sought by his pre-trial motion to inquire into not

only the illegalities obvious during the indictment process, to-wit: the voting in open court in the presence of the prosecutor, but also prosecutorial misconduct surrounding the presentation of the case to the Grand Jury. This was significant because the defendant was a former circuit judge and attorney in Baldwin County, Alabama, and well-known in the community. (Supplemental Transcript B). An indictment obtained utilizing a procedure such as the one in this case is conduct contrary to "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Palko v. Connecticut, 302 U.S. 319 (1937), citing, Hebert v. Louisiana, 272 U.S. 312 (1926). Such an indictment requires a dismissal.

Because of the novel procedure

used to indict the defendant in this case, his counsel sought to inquire into the possibility and apparent probability of prosecutorial misconduct in the presentation of the case to the Grand Jury. (Supplemental Transcript B).

Most jurisdictions, including Alabama, have secrecy statutes prohibiting the examination of grand jurors for this purpose. However, since a vote had already been taken in open court, the purpose of maintaining the secrecy of the deliberations had already been violated.[3] The trial court, therefore,

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[3]This Court has stated the objectives of grand jury secrecy requiements as follows: (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later

violated due process and fundamental fairness by disallowing further inquiry by counsel regarding the conduct of the prosecution in presenting the case to the Grand Jury. Court ordered disclosure of grand jury proceedings is permitted in some jurisdictions where a motion to dismiss an indictment because of matters occurring before the grand jury is filed.[4] Although Alabama

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appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. United States v. Proctor & Gamble Co., 356 U.S. 677 (1958).

[4]Ky. R. Crim. P. § 5:24; Ohio R. Crim.P. § 6(E); Kan. Stat.Ann. § 22-3012; Fed.R.Crim.P., Rule 6.

does not have a similar statute, the occurrence of the grand jury vote in this case in open court in the presence of the prosecutor, had obviated the necessity for secrecy.

Elementary is the rule of law permitting counsel for a criminal defendant to present evidence on a motion which is properly before the Court. Pate v. Robinson, 383 U.S. 375 (1966); Alabama Temporary Rules of Criminal Procedure, Rule 16.6(c); U.S. CONST. Amend. VI and Amend. XIV. The trial court violated this rule by disallowing an inquiry into the alleged improprieties surrounding the presentation of this case to the Grand Jury.

III. IS A PROCEDURE WHEREBY A STATE, CONTRARY TO ITS OWN STATUTORY PROSCRIPTION AGAINST THE PRESENCE OF THE PROSECUTOR DURING A VOTE OF THE GRAND JURY

AND AGAINST ITS OWN STATUTE PROSCRIBING A PUBLIC VOTE ON THE RETURN OF AN IN- DICTMENT BY THE GRAND JURORS, ALLOWS GRAND JURORS TO CONDUCT A VOTE IN OPEN COURT IN THE PRESENCE OF THE PROSECUTOR VIOLATIVE OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND TO DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMEND- MENTS TO THE UNITED STATES CONSTITUTION?

The Court should establish a per se rule that a state must follow its own established procedures regarding the indictment process and presentation of cases to grand juries, where, by statute, it has enunciated the purpose of the procedure as being essential to the fair and impartial administration of justice (grand jury secrecy) and where the State has made the procedure mandatory (preclusion of prosecutors from Grand Jury voting). The rule

should state that failure to follow its own established procedures is a per se violation of the Due Process Clause of the Fourteenth Amendment and of the right of a criminal defendant to fundamental fairness under the Sixth and Fourteenth Amendments. Palko v. Connecticut, 302 U.S. 319 (1937). This rule should be per se, not requiring a showing of prejudice, only in a case such a the one at bar where the State statute makes following the procedure mandatory or where the State statute, as in this case, declares the procedure to be essential to the fair and impartial administration of justice.

IV. A DEFENDANT CANNOT, CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND WITH HIS RIGHT TO A FUNDAMENTALLY FAIR TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, WAIVE

A REQUIRED STATE STATUTORY PROCEDURE OF INDICTMENT BY A GRAND JURY WHICH VOTES IN SECRET AND DURING WHICH VOTE THE PRESENCE OF THE PROSECUTOR IS PROSCRIBED.

The dissenting opinion of the Alabama Supreme Court, set forth infra at A-65 in its entirety, states that the majority of the Court relied on the stipulation of counsel in quashing the unit of certiorari as improvidently granted. The stipulation provided, in pertinent part: "At the conclusion of the hearing at which the defendant and the State presented witnesses, the Court made a finding of fact and ruled as a matter of law that a proper true-bill had been returned on the HAYES-REDMOND indictment." [Appendix, infra at A-70]. This stipulation was necessary because there was an inadequate record to preserve the grand jury impropriety issue for

appellate review. The dissenters correctly stated that the parties clearly intended to stipulate that the trial court had made a finding that the indictment was proper. The parties did not stipulate that the trial court's finding was correct. The parties intended to facilitate review of the very error that both Alabama Appellate Courts have, according to the dissenting opinion, essentially held to have been waived.

The Petitioner argued on rehearing, and reiterates his argument herein, that there was no waiver of the grand jury issues presented in this petition. The stipulation of counsel clearly sought to preserve for review the issue of whether the State complied with its own statutory grand jury secrecy requirements and its own

statutory proscription against the the presence of the prosecutor during grand jury voting. The stipulation was necessary because of the lack of a record of the Grand Jury proceedings.

However, the ruling of the Alabama Supreme Court requires addressing the issue whether a proper indictment can be waived, where the State resorts to the Grand Jury procedure, and makes it mandatory. Alabama provides, both constitutionally and statutorily, that only under the filing of an information under the specific circumstances enumerated in Article I, § 8, Ala. Const., 1901, Amend. 37, Ala. Const., 1901, and Code of Alabama 1975, § 15-15-21, is an indictment not required.

In Kennedy v. State, 39 Ala.App. 676, 690, 107 So.2d 913, 926 (1958), when confronted with the question of whether a criminal defendant can waive

a proper indictment, the Court stated:

> "The Appellant cannot waive the absence of an indictment: waiver there of is only possible under the terms of Amendment 37, supra, when a prisoner desires to plead guilty while awaiting action of a prospective grand jury on a non-capital felony charge, Code 1940, T. 15, §§ 260-266.
>
> "According to the opinion in People ex rel. Battista v. Christian, 249 N.Y. 3 4, 164 N. . 111, 61 A.L.R. 793, the constitutional requisition of indictments generally in all cases of felony is not one conferring a mere personal privilege upon an accused person, but is so the public concern for due and proper administration of the law that no individual may waive it."

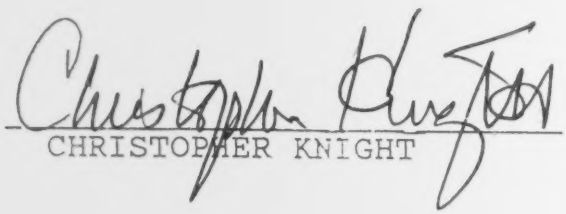
Thus, under Alabama law, a proper indictment cannot be waived in the absence of a proper information filed under the circumstance of a prisoner desiring to plead guilty to an non-capital felony offense. Nor is it

possible to waive a substantive defect in an indictment. Carruth v. State, 23 Ala.App. 113, 121 So. 498 (1929).

There was no information filed in this case, and substantive defects occurred in the indictment process which deprived this defendant of his right to fundamental fairness and due process of law. Because the State has resorted to the indictment process, it must do so in accordance with its enacted procedures. Beck v. Washington, 369 U.S. 941 (1962). This defendant is not capable, under Alabama law, of waiving a proper indictment. Moreover, the ruling of the Alabama Supreme Court without opinion, ostensibly holding that a waiver occurred, was erroneous in that the opinion misconstrued the stipulation of counsel.

The Court should grant the

writ of certiorari in this case and hold that Alabama is required under the Due Process Clause of the Fourteenth Amendment and under principles of fundamental fairness under the Sixth and Fourteenth Amendments to follow its own statutory and constitutional mandates regarding grand jury proceedings.



CHRISTOPHER KNIGHT

CERTIFICATE OF SERVICE

I, Christopher Knight, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served three (3) copies of this Petition for a Writ of Certiorari on the Honorable Don Siegelman, Attorney General of Alabama, by depositing same in the United States mail, properly addressed and first class postage prepaid on this the 6TH day of AUG ~~July~~, 1987.

Christopher Knight

CHRISTOPHER KNIGHT

APPENDIX

ANDREW WILSON HAYES, alias

v.

STATE.

1 Div. 816.

Court of Criminal Appeals

of Alabama.

May 13, 1986.

Rehearing Denied June 10, 1986.

TYSON, Judge.

Andrew Wilson Hayes and a co-defendant, Thomas H. Redmond, were charged by indictment with securities fraud contrary to the provisions of § 8-6-17 Code of Alabama 1975 as amended.

Initially, there were five counts in the indictment with reference to the appellant, Hayes; however, only two of these counts, counts 17 and 19 were allowed to go to the jury and these

two counts form the basis of the conviction against this appellant. They are as follows:

"COUNT SEVENTEEN

"The GRAND JURY of said County charge that, before the finding of this indictment ANDREW WILSON HAYES, alias WILSON HAYES, whose name is to the Grand Jury otherwise unknown than as stated, hereinafter referred to as the DEFENDANT, did, contrary to law, willfully and unlawfully, in connection with the offer, purchase, or sale of a security, to-wit: a Ten Thousand ($10,000.00) dollar Surplus Note of Southern Heritage Life Insurance Company, hereinafter referred to as a security, directly or indirectly, on or about June 30, 1980, employ a device, scheme or artifice to defraud GEORGE BOLAR in the following manner,

to-wit: by causing a Ten Thousand ($10,000.00) dollar Surplus Note of Southern Heritage Life Insurance Company to be issued to GEORGE BOLAR under the terms of which Southern Heritage Life Insurance Company could not legally consider said Note a legal liability until such time as the annual statement filed with the Insurance Department of the State of Alabama disclosed that the surplus of said company was in excess of Two Hundred Thousand ($200,000.00) dollars, the DEFENDANT knowing that the Certificate of Authority of Southern Heritage Life Insurance Company had been revoked by the Alabama Commissioner of Insurance on or about May 15, 1980, which effectively prohibited Southern Heritage Life Insurance Company from obtaining a Two

Hundred Thousand ($200,000.00) dollar surplus by engaging in the insurance business, in violation of §8-6-17(1) of the Code of Alabama (1975), and against the peace and dignity of the State of Alabama."

"COUNT NINETEEN

"The GRAND JURY of said County charge that, before the finding of his indictment ANDREW WILSON HAYES, alias WILSON HAYES, whose name is to the Grand Jury otherwise unknown than as stated, hereinafter referred to as the DEFENDANT, did, contrary to law, willfully and unlawfully, in connection with the offer, purchase or sale of a security, to-wit: a Forty-Two Thousand ($42,000.00) dollar Surplus Note of Southern Heritage Life Insurance Company, hereinafter referred to as a security, directly or indirectly, on or about December 20, 1979, employ a

device, scheme or artifice to defraud GRACE MAGNOR in the folowing manner, to-wit: by causing a Forty-Two Thousand ($42,000.00) dollar Surplus Note of Southern Heritage Life Insurance Company to be issued to GRACE MAGNOR under the terms of which Southern Heritage Life Insurance company could not legally consider said Note a legal liability until such time as the annual statement filed with the Insurance Department of the State of Alabama disclosed that the surplus of the company was in excess of Two Hundred Thousand ($200,000.00) dollars, the DEFENDANT knowing that Southern Heritage Life Insurance Company did not have any insurance policies in force, that Southern Heritage Life Insurance Company had not received any premium income since June 1,

1979, and that monies obtained through the sale of said Surplus Note would be diverted to the use and benefit of the DEFENDANT, in violation of § 8-6-17(1) of the Code of Alabama (1975), and against the peace and dignity of the State of Alabama."

The remaining counts were charges against the co-defendant, Thomas H. Redmond, and his appeal has been dismissed on his own motion. Thus, these counts will not be here repeated.

The jury found the appellant "guilty as charged in the indictment" and the trial judge set sentence at five years to run concurrently on each count. In addition, Hayes was to pay restitution in the amount of $47,759.19 to Grace Magnor and, also, pay restitution in the amount of $3,333.00 to

George Bolar.

The co-defendant, Redmond, was convicted on five counts and sentenced to ten years to run concurrently on each count and an identical restitution order was entered as to the co-defendant, Redmond.

The appellant raises some seven issues on this appeal. The facts of this cause will be stated with reference to the various issues as they are discussed in this opinion.

I

The appellant, Hayes, filed a motion to challenge the Grand Jury asserting that certain improperieties occurred with reference to the presentation of the State's evidence to the Grand Jury and that certain procedural irregularities occurred at the time the

indictment was returned and requested the trial court to allow him to examine the members of the Grand Jury. This motion is contained on record page 1110 of this record.

A supplemental transcript was filed in this court which is identified as Transcript A and Transcript B. This supplemental transcript contains a stipulation of the attorneys with reference to the hearing before the trial judge concerning the alleged improprieties in presenting the indictment to the trial court.

For brevity, the Attorney General's office drafted two indictments in this cause. The first indictment contained 19 counts, five of which pertained to the appellant, Hayes and 14 counts pertained to the defendant,

Redmond. This indictment is referred to as the Hayes-Redmond indictment in the stipulation.

The second indictment contained 14 counts pertaining only to the defendant, Redmond. The 14 counts as to the defendant, Redmond, were identical in each indictment.

Some seven witnesses appeared before the Grand Jury including the appellant, Hayes, on October 27, 1983. Scores of documents were also presented to the Grand Jury.

Because of the late hour, it was agreed that the Grand Jury would vote the following morning on October 28, 1983.

One of the prosecutors, Pat Robinson, handed what he thought to be the Hayes- Redmond indictment to the

foreman of the Grand Jury, one Mary Northcutt. Each count of this indictment was explained to the Grand Jury. The Grand Jury was asked to vote on each count of the indictment and that they should return a no bill if they felt the evidence was insufficient as to any count.

Soon after the grand jurors voted, they sent word that they were ready to present the indictment in court. The prosecutors were informed that a true bill had been returned on the Hayes-Redmond indictment. This action was presented to Judge Wilters in open court at approximately 1:30 p.m. on the afternoon of October 28, 1983. After thanking the members of the Grand Jury for performing their duty, the grand jurors were directed to proceed to the

circuit clerk's office in order to be paid. At this point, Judge Wilters had not entered an order discharging the grand jurors as such.

Within two or three minutes after the members of the Grand Jury left the court room to go to the clerk's office, it was discovered that, in fact, the grand jurors had signed the "Redmond indictment" and not the "Hayes-Redmond indictment".

Judge Wilters then directed that all grand jurors return from the clerk's office to his court room at once. Sixteen members of the Grand Jury then reconvened in Judge Wilters office at approximately 1:45 p.m. on the afternoon of October 28, 1983. These 16 grand jurors then advised Judge Wilters that they, in fact, had returned a true bill

on the "Hayes-Redmond indictment". Judge Wilters was satisfied that an honest mistake had been made and that the wrong indictment had been signed by the foreman of the Grand Jury. Judge Wilters then directed that the Hayes-Redmond indictment be retyped in order to allow adequate space to be left on which to set bond as to each of the two defendants. With the members of the Grand Jury still present in the court room, Judge Wilters then asked, and Mr. Robinson asked each of them, which indictment they had voted to return. Each individual grand juror responded that they had voted to return the "Hayes-Redmond indictment". Each was then asked if they had any objection to having the indictment corrected and to allow space for the trial judge to set bail

all replied that they had none. Each of the grand jurors then left the court room except for the foreman, Mrs. Northcutt.

Within less than five minutes after departure of the remaining members of the Grand Jury, Judge Wilters' secretary completed the retyping of the Hayes-Redmond indictment in order to allow space for the trial judge to set bonds as to each defendant.

Mrs. Northcutt then reaffirmed that the grand jurors had only considered the Hayes-Redmond indictment and that this was the indictment which she had been directed to sign. The Hayes-Redmond indictment then was signed and processed through the circuit clerk's office as the indictment which had been voted upon by the members of the Grand

Jury.

The original "Redmond indictment" was not voted upon and was not signed because the members of the Grand Jury indicated that this was not the indictment which they returned. This indictment was retained in the possession of Mr. Robinson.

Following the conclusion of the hearing at which the State and the defendant each presented witnesses, the trial court made findings that, in fact, a proper indictment had been returned and was in proper form and that this was the "Hayes-Redmond indictment". This was stipulated. See Record .07 of Exhibit A, Supplemental Transcript.

In light of the stipulation which was filed and is a part of this record on appeal and the findings of the trial

judge as to what actually transpired in the Grand Jury, this court finds no violation of any statute with reference to the Grand Jury proceedings in this State. See Sections 12-16-190 through 12-16-233, Code of Alabama 1975 as amended.

[1] We have reviewed each of the statutes as hereinabove noted and find no improprieties in the presentment of this cause to the Grand Jury or in the presentation of the correct indictment to the court by the Grand Jury in this cause. No error appears.

II

The appellant challenges Rule 15, Temporary Rules of Criminal Procedure as adopted by the Supreme Court of Alabama and avers that such is unconstitutional in that it diminishes the number of

strikes allowed a defendant in a joint trial. The appellant also states that requiring a one for one jury strike in a cause such as this also violates the appellant's consitiutional rights.

The Supreme Court of Alabama in Ex Parte Cofer, 440 So.2d 1121 (Ala. 1983) and this court in Holsemback v. State, 443 So.2d 1371 (Ala. Crim.App. 1983) have expressly rejected the arguments herein advanced by appellant.

Cofer, supra, specifically determines that the matter of the number of strikes in a criminal trial is a procedural change and does not contravene any constitutional right of the appellant.

[2,3] Holsemback, supra, points out that Temporary Rule 15, A.R.C.P. now takes precedence over § 15-14-20, Code of

Alabama 1975 and eliminates the right to demand a separate trial by any defendant jointly indicted. This rule also covers the manner in which strikes shall be conducted in a joint trial and points out that such is a procedural manner and does not contravene any constitutional right of the appellant. Having given the appellant's argument due consideration, we adhere to the two opinions herein mentioned and determine that no constitutional right of this appellant was infringed in this trial.

III

The appellant next challenges by appropriate motion counts 17 and 19 on which the jury found the appellant guilty and whether or not the State of Alabama proved a prima facie case of

securities fraud as to these two counts.

Essentially, count 17 charges that, while acting as President of Southern Heritage Life Insurance Company, Andrew Wilson Hayes did cause a Surplus Note to be issued by the company to George Bolar, knowing that the company's license had been revoked by the Alabama Commissioner of Insurance and that its assets had become impaired during this time so that there was no premium income coming into this company.

Similarly, count 19 charges that Andrew Wilson Hayes, as President of Southern Heritage Life Insurance Company, caused a Surplus Note to be issued to one Grace Magnor again after the assets of the company had become impaired, so that there was not sufficient premium income to pay the liabilities

and that the funds paid in would be diverted to the benefit of the appellant, Andrew Wilson Hayes.

Great Southern Financial Corporation owned 100% of Southern Heritage Life Insurance Company and Founders Investment Corporation owned 50.8% of Great Southern Financial Corporation. R. 135.

The appellant, Hayes, was President of Southern Heritage Life Insurance Company as of December 31, 1979 and owned 2397 shares, or 54.6% of Class B stock in Founders Investment Corporation as of this date.

The testimony of several witnesses indicated that it was not customary for an investor to make an investment in a "Surplus Note". Moreover, Southern Heritage Life Insurance Company's charter was revoked on May 15, 1980.

(R. 140). This meant that Southern heritage Life could not sell insurance after this date.

The State of Alabama presented some 15 witnesses in its case in chief. We find the following to be an accurate statement of the evidence against this appellant which is taken from the State's brief and it is herein set out as an accurate summary:

"... Mr. [Paul] Raadt, ... Chief Examiner for the Alabama Department of Insurance, testified that he did a field examination or audit of Southern Heritage Life Insurance Company for the one half year period ending on June 6, 1978. As of June 30, 1978 he found Southern Heritage to be insolvent, that its liabilities exceeded assets. (R. 121). Raadt defined a surplus note to be one

that is a loan to the company which is to be paid out of the surplus of the company in an unspecified time. (R. 122). It is the sale of the surplus note which is at the core of this indictment. According to Raadt, as of June 30, 1978, Southern Heritage had $463,000.00 in surplus notes outstanding. (R. 124). The annual statement received by the Department of Insurance covering the period ending December 31, 1979 which was received by the Department on April 30, 1980, showed only two officers of Southern Heritage Life Insurance; Wilson Hayes and Edwin Howard. (R. 130). As of December 31, 1979, Southern Heritage had capital and surplus in the amount of $248,000.00; it had $540,000.00 in surplus notes, thus, the borrowed surplus was higher than its

capital. (R. 131). During the year 1979, Raadt testified that there was an increase in surplus notes issued by the company in the amount of $77,000.00. (R. 132). According to Raadt, the Southern Heritage would be solvent except for the surplus notes. (R. 132). Raadt testified that the assets of the company equaled $302,000.00 and the company had $540,000.00 in outstanding surplus notes; the liabilities of the corporation of the company equaled $54,000.00. (R. 133). According to Raadt, Southern Heritage would be a strong company but for the surplus notes. (R. 133). Raadt defined the term statutory deposit which is a deposit held by the State with a market value not less than $100,000.00 Raadt stated that Southern Heritage had such a deposit and

that such a deposit is considered an asset of the company. (R. 133). The purpose of the statutory deposit is to protect depositors in case of financial problem incurred by the company. The statutory deposit is not reachable by the insurance company. (R. 134). According to the annual report for the period ending 12-31-79 and signed by the defendant Hayes, the structure of ownership of Southern Heritage was as follows: Founders Investment Company owned 58% of Great Southern Financial Corporation which in turn owned 100% of Southern Heritage Life Insurance. According to Raadt, the defendant Hayes owned 54.60% of the Class B stock in Founders Investment Company. The Class B stock is the voting stock of Founders. Thus, Hayes had control over Founders Investment

Company. (R. 135-136). Raadt stated that Founders Investment and Great Southern Financial Corporation were not doing business as insurance companies, but that Southern Heritage Life Insurance Company was their major asset. (R. 136). . Raadt stated that there was no record of how the defendant became president of Southern Heritage Life Insurance Company. (R. 137). According to Raadt, a surplus note is not an ordinary investment. It is usually an investment made by people with a financial interest in the company. According to Raadt, ordinary investors would not ordinarily have heard of surplus notes or invest in them. (R. 138). Raadt stated that Southern Heritage's Certificate of Authority was revoked by the insurance department on

May 15, 1980 which meant that Southern Heritage could no longer sell insurance in the state of Alabama. (R. 139-140). Raadt stated that a re-insurance agreement was entered into by Southern Heritage on June 1, 1979. What this meant was that all insurance policies in force issued by Southern Heritage were reinsured with another company (Old Southern Life Insurance Company). (R. 140). The effect of this re-insurance agreement was that Southern Heritage was no longer issuing insurance policies and all of the policies they had in force were reinsured with another company. Thus, as of June 1, 1979 Southern Heritage had no premium income. (R.141). "The next witness was Charles Lollar who was chairman of the board and acting president of Southern Heritage Life Insurance Company until November 16, 1979.

(R. 172). He stated that in June of 1979, Southern Heritage sold all its insurance that it had in force to Old Southern Life Insurance Company. (R. 173-174). Lollar testified that the defendant was a member of the board of Southern Heritage and he attended the board meetings and voted as a member of the board. (R. 176). Lollar testified that when he left Southern Heritage on November 16, 1979, the company had a surplus of between fifty and seventy thousand dollars and outstanding surplus notes of approximately $400,000.00. (R. 180).

"The next witness was Elizabeth Sandoz who knew Redmond since 1976 and the defendant Hayes since 1979. An associate of Redmond, Don Price, approached Sandoz with an offer to make an investment with Redmond during the later part of June, 1976. (R. 204). The amount

Sandoz was to invest was $125,000.00 and in return she was to receive an interest bearing note at 8% and an option to buy into Southern Heritage. (R. 205). The interest was to be payable the first of each month and the principal was repayable in $25,000.00 blocks beginning in late 1978 or early 1979. (R. 206). According to Sandoz, she never received those principal payments. (R. 216). She did receive interest payments from approximately July, 1976 until the end of 1978. (R. 206). According to Sandoz, Redmond retrieved the note from her. (R. 207). The note was signed by Redmond in Hayes' office. (R. 207-211). Hayes apparently at this time was still in the private practice of law. According to Sandoz, Redmond met with her in December of 1978 and told her that she had a choice to accept a block of stock

in Southern Heritage Life Insurance Company or he would name her as a creditor in a bankruptcy proceeding he was involved in Illinois. (R. 219-223). Sandoz had no more dealings with Redmond for the subsequent two years and did not receive dividends or interest or anything from either the interest bearing note of stock. (R. 223). Sandoz stated that Redmond appeared one evening bearing a check for $1,000 dollars which she did not know was principal or interest. (R. 224). A block of stock was retrieved by Redmond the following day. (R. 225). Her testimony at this point is rather confusing as to whether she was to mail the stock to Redmond or Redmond pick up the stock or if she was to take the stock to Redmond. In any event, she ended up with the stock she testified unequivocably. She went home and

Redmond picked up the Southern Heritage stock at her home which is located in Fairhope. (R. 232). According to Sandoz, the transaction with the stock occurred in January of 1979. (R. 233). Two years went by from the date Redmond picked up the stock before she received any payment on the principal. (R. 234-235). She received a total of $12,000.00. (R. 234-235). According to Sandoz, she talked to Hayes about the investment in 1979 in his courthouse office. (R. 235). There was no cross examination on behalf of the defendant. The next witness for the State was Fredrick Clarke who works for the Merchants National Bank in Mobile. He authenticated Sandoz' cashier check dated June 9, 1976 in the amount of $125,000.00. The check had Redmond's endorsement on it in the name of Financial Counseling Incorporation.

(R. 273-275). There was no cross examination on behalf of the defendant.

"The next witness called by the State was Alyce Asztalos. Alyce Asztalos' mother is Mrs. Magnor, who ultimately purchased the Surplus Note made the basis of the indictment. The witness was introduced to Redmond by one Jim Daniels, whom she met in April of 1977. (R. 277). Daniels introduced Redmond to Alyce Asztalos at the Holiday Inn in Michigan City, Indiana; Mrs. Magnor lives in Franklin, Tennessee. (R. 278). The witness stated that Mrs. Magnor had an annuity with American Fidelity Life Insurance Company whose home offices were Pensacola. Daniels sold Magnor the annuity valued at $42,000.00. (R. 279-280). Alyce Asztalos met with Redmond and Daniels in Indiana at the end of 1979. At that time the witness was told that Redmond had a company in

Alabama that would pay on the annuity; the company was an 'old, well established insurance company in Alabama.' (R.285). This conversation took place at the end of November, 1979. (R. 281). Redmond told the witness that he was president of Southern Heritage Life Insurance Company and Daniels was vice-president/treasurer. (R. 285-286). At Redmond's insistance or at least encouragement, the witness called her mother that evening and stated to her that the investment sounded good. (R. 289-290). The witness stated that both Redmond and Deniels said it would be a better investment since it would make 11% interest instead of the 9% which the annuity was now earning. (R. 291). Redmond and Daniels stated to the witness that they could stop in Franklin, Tennessee at Mrs. Magner's residence on the way to Alabama where they could talk with her and finish the paperwork to

effectuate the transfer. (R. 292). Alyce Asztalos stated that she asked what a surplus debenture note was and that Redmond said it was when the premium income exceed claims, the excess money would be invested. (R. 293). According to Alyce Asztalos, Redmond said that the $42,000.00 was going to be invested in Southern Heritage Life Insurance Company. (R. 294). According to Alyce Asztalos, Redmond did not tell her of the $125,000.00 Sandoz note or the corporate structure of Southern Heritage nor inform her of the shareholders of Southern Heritage nor Founders Investment Company nor Great Southern Financial Corporation. (R. 295). Alyce Asztalos said she would not have recommended the investment to her mother had Redmond disclosed the above details. (R. 297). According to Alyce Asztalos,

her mother did not receive her monthly interest checks. (R. 298). She does not know the defendant Hayes. (R. 298). The witness wrote a letter to the insurance commissioner on or about August 19, 1982 complaining that the interest checks from the surplus note were consistently late. (R. 301). On one occasion the witness recalled calling Redmond and he asked her why she had written the letter to the insurance commissioner. (R. 302). According to the witness, Redmond stated that she should write another letter to the commissioner saying that everything had been ironed out. According to Alyce Asztalos, Redmond threatened not to send any more interest checks to Mrs. Magnor. (R. 303-305). All of the above took place in October of 1982. (R. 305). Redmond stated that Southern Heritage

Life Insurance owned land in Indians and would give Mrs. Magnor a warranty deed for three or four pieces of land valued at $19,000.00 a piece. (R. 305). However, Mrs. Magnor never received the warranty deed and, according to the witness, never received her $42,000.00 dollars back or any subsequent interest payments. (R. 306). According to the witness, Redmond told her that Southern Heritage Life Insurance Company was located in Spanish Fort, Alabama. (R. 322). State's exhibits 10 and 11, interest checks from Southern Heritage to Mrs. Magnor were admitted into evidence. Said checks bear the signature of the defendant. (R. 322-325).

"The next witness for the State was Grace Magnor. She stated that she invested $42,000.00 in Southern Heritage Life Insurance Company. (R. 327-328).

She stated that Daniels and Redmond talked to her about investing in Southern Heritage; they said it would be a better investment. This conversation took place to the best of her knowledge in December, 1979. (R. 328-330). She gave Redmond and Daniels a document when they visited her in Tennessee authorizing withdrawal of her annuity with American Fedelity and investing same in Southern Heritage. (R. 329). After writing a letter to Southern Heritage making sure in fact that her $42,000.00 had been received, she received a letter from Southern Heritage saying the $42,000.00 had been received. (R. 330-331). She testified that no one explained what a surplus note was to her. (R. 331). The defendant's signature appears on the note as president of Southern Heritage Life Insurance Company. (R. 331). When Mrs.

Magnor did not receive her interest payment, she called Southern Heritage. She stated that Redmond and Daniels did not tell her that Southern Heritage was not selling insurance or discuss Redmond's note to Sandoz or his personal bankruptcy petition in Indiana. (R. 334-335). She stated that if she had known about the financial condition of Southern Heritage Life and Redmond, she would not have invested the money. (R. 337). State's exhibit 12, a note drawn on Southern Heritage, was admitted into evidence. Said note was signed by the defendant Hayes. (R. 338-340). Mrs. Magnor testified that she never talked to Hayes about the financial condition of Southern Heritage. (R. 340). Mrs. Magnor testified that she did not transfer her money based solely on her daughter's recommendation. (R. 353).

Mrs. Magnor testified that Redmond and Daniels explained investment to her and thus she subsequently signed a transfer letter transferring the money to Southern Heritage. (R. 355-357). Mrs. Magnor testified that after writing the letter to Southern Heritage complaining of not receiving her interest payments, she did in fact receive them for approximately 6 to 7 months. In August of 1980, the interest payments ceased. (R. 360-361). Mrs. Magnor's transfer letter authorizing the transfer of her money was dated December 12, 1979. (R. 364).

"The next witness for the State was L.B. Sutherland who was vice-president of American Fidelity. He authenticated a check dated December 12, 1979, State's exhibit 13 for the amount of $42,000.00. (R. 370). There was no cross

examination on behalf of the defendant. "The next witness called was Robin Bolar whose father is George Bolar who lives in Daphne, Alabama. Robin testified that her father gave Redmond $10,000.00 in exchange for a surplus note so that he could earn a higher interest rate than was being offered by the banks at the time. (R. 378). He was present when her father gave the money to Redmond. (R. 379). Bolar testified that her father had to borrow the money in order to get the $10,000.00. He borrowed the money at 11% and Redmond had promised a return of 11.25% on the surplus note. (R. 380). Bolar testified that the checks were turned over to Redmond at the Southern Heritage Life Insurance Company office on Highway 31 in Spanish Fort, Alabama. (R. 381). Her father received a receipt for $8,000.00 which

was dated March 18, 1980. (R. 382). According to Bolar, three or four months later her father gave Redmond a personal check for the remaining $2,000.00. (R. 382). After Redmond received the $2,000.00 he brought the surplus note to Bolar's house. Redmond, according to Bolar, said the note was a certificate. (R. 383). State's exhibit 17, the certificate given to Mr. Bolar was introduced into evidence. (R. 383). The defendant's signature as president of Southern Heritage Life Insurance Company appears on the certificate. (R. 384). Redmond told Bolar that he would receive 16% interest although only 10% interest appears on the note. (R. 384). According to Mr. Bolar, her father did not receive any money on the certificate until February of 1983. (R. 386). In February, 1983, her father

received a cashier's check for $6,000.00 and warranty deed from Redmond. (R. 386). The defendant's signature appears on the warranty deed. (R. 387-388). Redmond stated to Mr. Bolar that he would buy back the land to repay the money. According to Mr. Bolar, his father ultimately was paid $10,000.00 plus $40.00 in interest. (R. 387-388). There was no cross examination.

"The next witness was Mr. George Bolar. Mr. Bolar recounted essentially the same facts as his son. (R. 405-406). Since he is blind, his daughter had to read the note to him and the note carried the name of Southern Heritage Life Insurance Company. (R. 407). According to Mr. Bolar, Redmond did not tell him about the financial condition of Southern Heritage or about any bankruptcy petition or the Sandoz note. (408-409).

Furthermore, Redmond did not tell Bolar that Southern Heritage's Certificate of Authority had been revoked. (R. 410). The date on the Bolar note is June 30, 1980 which is after the Certificate of Authority had been revoked on May 15, 1980. (R. 410). Redmond stated to Bolar that he, Bolar, would get his money back, when he, Redmond, was ready. Mr. Bolar testified that he tried to get his money back many, many times from Redmond. (R. 412). The above conversations with Redmond took place in Baldwin County. (R. 413). According to Mr. Bolar, Redmond asked him not to testify. (R. 415).

"The next witness called by the State was Craig Helms of the Southern Trust Bank of Baldwin County which formally was called Baldwin County Bank. The check payable to Mrs. Magnor was negotiated at his bank.

It was endorsed by Hayes as president of Southern Heritage Life Insurance Company. (R. 429). State's exhibit 19, a certificate of deposit, was purchased by Southern Heritage Life Insurance in the amount of $42,000.00 on December 26, 1979. (R. 430). At this point several checks were used to purchase other instruments. State's exhibit 13 was used to purchase State's exhibit 19. The amount on State's exhibit 13 was $42,247.50. The amount on State's exhibit 19 was $42,000.00. The difference was paid to Southern Heritage Life Insurance Company. (R. 431). State's exhibit 21, a signature card for Southern Heritage checking account was introduced. The authorized signatures were defendant Hayes, Howard, and one Ms. Viggues who is Redmond's secretary. (R. 432). The signature card for Founders Invstment Corporations' checking account

contained the same three names. Both account signature cards were signed on January 7, 1980. (R. 433). State's exhibit 19, the CD was cashed. One cashier's check for $25,000.00 was issued to Founders Investment; one cashier's check in the amount of $17,000.00 was issued to Southern Heritage. (R. 436). The check issued to Southern Heritage was dated for January 1, 1980. (R. 436). Southern Heritage's bank statement for January, 1980 shows a deposit made on January 14, 1980 for $17,000.00; it also shows on January 17, 1980 a withdrawal in the amount of $16,000.00. (R. 437). State's exhibit 24, a check drawn on Southern Heritage's account, was issued to defendant Hayes in the amount of $16,000.00. Said check was endorsed by the defendant. (R. 437-438). State's exhibit 26, a copy of a

cashier's check in the amount of $25,000.00 payable to Founders Investment Corporation and dated January 14, 1980 was purchased by Southern Heritage. (R. 440). State's exhibit 17, a deposit slip on the account of Founders Investment Corporation contained an entry for the amount of $25,000.00 made on January 14, 1980. The bank statement for that month showed one check drawn on that account in January for an amount of $25,000.00. (R. 441). The State's exhibit 33, a check drawn on January 14, 1981 on Funders Investment account was made payable to Financial Counselors Incorporated, d/b/a Midwest Enterprises in the amount of $25,000.00 is endorsed by Redmond. (R. 442). The defendant Hayes and Ms. Viggue signed the above check on behalf of Founders. (R. 442). State's exhibit 34, a cashier's check dated

January 14, 1980 issued by the Baldwin County Bank, payable to Financial Counselors d/b a Midwest Enterprises, was purchased by Founders Investors Corporation. The check was negotiated by Financial Counselors as endorsed by Redmond. (R. 443). State's exhibit 15, a cashier's check in the amount of $2,000.00 purchased by Bolar, made payable to Southern Heritage was issued on July 1, 1980. (R. 444). State's exhibit 14, a deposit slip on the account of Southern Heritage lists three items with a total deposit of $8,000.00. (R. 446). All three items were payable to Mr. Bolar, who endorsed the items over to Southern Heritage. (R. 446). The above deposit was made on March 19, 1980. (R. 447). No cross examination was offered on behalf of the defendant.

"The next witness was Lucretia Rosser

who is an employee and custodian of records for Citizens Trust Bank in Atlanta. She authenticated State's exhibit 35, the signature card for an account in the name of LeCap Hospitality Management d/b/a Midwest Enterprises. (R. 457). Redmond is one of the signatories on that card. (R. 457). State's exhibit 35, a cashier's check drawn on Baldwin County Bank was deposited in the above account from Financial Counseling d/b/a Midwest Enterprises. (R. 458). "The next witness Gwen Franklin of the First National Bank of Mobile. State's exhibit 36 was authenticated by her which is an off cash ticket and cashier's check purchased by Hayes and payable to Hayes used to purchase a wire transfer and $1,000.00 back in cash. (R. 461-462). State's exhibit 37 was an entry for $15,000.00 and a $3.00 fee for the wire

transfer. State's exhibit 38 was a cash ticket for the amount of $15,000.00; State's exhibit 39 was a copy of the wire transfer the bank made to the Federal Reserve Bank of Atlanta. The transfer was sent from Juan Gutierreze to Lupe Rodrigues. (R. 462). State's exhibit 40 was a deposit slip used to open a new account with an initial deposit of $2,000.00. The deposit was a check which was payable to Southern Heritage from George Bolar. (R. 462-463).

"The next witness was Ronnie McClure who works for a C.P.A. firm from Gadsden. McClure audited Southern Heritage's books ending December 31, 1979. (R. 465). During February of 1980, McClure had a meeting with Hayes and one Ferris, a partner in the C.P.A. firm to discuss the financial transactions of Southern Heritage for the period ending December

31, 1979. (R. 466). As a result of the meeting, McClure made a journal entry to record the $42,000.00 CD and surplus note to Magnor for $42,000.00. Another entry was made for the purchase of a condominium for $35,000.00. and the issuance of a surplus note to Financial Counseling Corporation for $35,000.00 and the sale of the $35,000.00 condo to James Daniels. (R. 467-568).

"The next witness called by the State was Ruth Viggue who worked for Hayes for approximately sixteen to seventeen years as his secretary. She testified that Southern Heritage had an office in Spanish Fort, Alabama. (R. 472). Daniels was an office manager for another insurance company. (R. 473). Mrs. Viggue was not aware of any business being conducted by Southern Heritage. (R. 474-475). She was authorized to sign

checks on the Southern Heritage checking account. She was familiar with Hayes' signature. She testified that the instrument to Bolar, signed by Hayes, was a surplus note. (R. 477). She further identified defendant Hayes' signature on the cashier's check, State's exhibit 36. (R. 478).

"The next witness called was Mr. Raadt again. He stated that an appeal was filed from the revocation of authority and the appeal was signed by the defendant, Hayes. (R. 498-502). The denial of the appeal was entered on June 23, 1980 and said denial was sent to the company in Spanish Fort. (R. 503). Raadt stated that Southern Heritage probably did not have enough money or any surplus to pay the surplus notes and after the revocation and could not legally issue surplus notes. (R. 503-507). Raadt

stated that an appeal to the Court of Civil Appeals was dismissed on July 24, 1981. Raadt stated that Hayes acquired Southern Heritage sometime in 1978. "James Hartley, an investigator with the Securities Department, was the next witness for the State. His testimony adds nothing that the other witnesses have not already testified to and therefore his testimony will not be detailed.

"After Hartley's testimony, the State rested its case."

The evidence clearly establishes that the appellant, Hayes, was the owner of Southern Heritage Life during 1978. By the end of 1979, the company was impaired and had reinsured all of its outstanding policies with another company. This left the company with no income from premiums.

At the end of 1979 Mrs. Magnor was induced to invest in Southern Heritage Life. She did not know what a "Surplus Note" was and indicated that she would not have invested in Southern Heritage had she known its financial condition. It is an accurate statement to indicate that Mrs. Magnor felt that she was buying another annuity in a different company. Knowing the financial condition of Southern Heritage Life, nevertheless, this appellant, as President, issued the Surplus Note to Mrs. Magnor. At this point in time the company's position was impaired, as it had sold its insurance policies and had no premium income. Mrs. Magnor did receive some principal and interest at a later date, but she did not receive all of her money. The funds she paid in were divided between the appellant, the

original co-defendant, Redmond, and a Mr. Daniels, who is now deceased.

The Bolar Surplus Note was issued on June 30, 1980, approximately six weeks after the Certificate of Authority had been revoked by the State Department of Insurance. It is true that the company appealed this revocation. The appellant, Hayes, signature appears on the "Surplus note". This appellant, knowing the financial condition of Southern Heritage Life, nevertheless, allowed the note to be issued. Bolar did receive some $10,000.00 and, later, some interest payments.

The headquarters of Southern Heritage Life was in Baldwin County, Alabama and the Surplus Notes were mailed from Baldwin County. Most of the financial transactions of this company took place in Baldwin County.

The appellant's place of residence was Baldwin County, Alabama, as was the company. There is no question but that venue was properly established in this cause.

As to what the State must prove by way of specific intent in a securities case, or as to guilty knowledge on the part of appellant, we find that the following statement by Mr. Chief Justice Torbert, speaking for the Supreme Court of Alabama, in Buffo v. State, 415 So.2d 1158 at 1165 (Ala.1982) covers the evidence in this cause and as to the measure of proof that must be presented most accurately:

> "As to whether the State must prove specific intent in a securities case, reference to the Comments and Commis-stioners' Notes to the Uniform Securities Act, after which the Securities Act of Alabama is modeled, are instructive. The comments to § 409(a), which

is similar to Code 1975, § 8-6-17, refer the reader to the comments under § 204(a)(2)(B) and provide:
'As the federal courts and the SEC have construed the term "willfully" ... all that is required is proof that the person acted intentionally in the sense that he was aware of what he was doing. Proof of evil motive or intent to violate the law, or knowledge that the law was being violated, is not required.'
"1 Blue Sky L.Rep. (CCH) ¶ 5524 at 1513 (1980). As required by the statute, Buffo was charged with willfully engaging in fraudulent conduct in connection with the offer, sale or purchase of a security. "While Alabama cases have held that there must be a guilty knowledge or mens rea, Favor v. State, 389 So.2d 556, 562 (Ala.Cr.App. 1980); Van Antwerp v. State, 358 So.2d 782 (Ala.Cr.App.), cert. denied, 358 So.2d 791 (Ala. 1978); Manson v. State, 349 So.2d 67 (Ala.Cr.App.), cert. denied, 349 So.2d 86 (Ala. 1977); federal cases have held this to mean: 'We think that the government is required to prove specific intent only as it relates to the action

constituting the fraudulent, misleading or deceitful conduct, but not as to the knowledge that the instrument used is a security under the Securities Act. The government need only prove that the object sold offered is, in fact, a security; it need not be proved that the defendant had specific knowledge that the object sold or offered was a security.

'...

'...[w]here inclusion of the instrument in question in the definition of a security in the context of a fraud case is itself a jural fact, the knowledge and belief of the defendant with respect to this is not a relevant fact requiring proof.'

"United States v. Brown, 578 F.2d 1280, 1284 (9th Cir. 1978). A party can willfully violated a securities law without knowing of its existence. United States v. Peltz, 433 F.2d 48 (2d Cir. 1970). It is reasonable to assume that one who connects himself so closely with such a transaction has an interest in that transaction and it places upon him the duty to stay informed as to the consequences of such a transaction. Van Riper v. United

> States, 13 F.2d 961, 966 (2d Cir. 1926). Thus, intent to deceive means 'intent to say something, that is expected to be relied on, that is not believed to be true, or, if strictly true, is hoped will be understood in an untruthful sense.' SEC v. World Radio Mission, Inc., 544 F.2d 535, 540 (1st Cir. 1976). Knowledge that the act is in violation of the securities laws, or that the instrument in question is a security, is not a relevant fact requiring proof. See, United States v. Riedel, 126 F.2d 81 (7th Cir. 1942)."

Since a Surplus Note can only be paid from surplus from the company, and since there was no real expectation of Southern Heritage Life having a surplus or being able to generate income, having sold its insurance policies, the entire transaction in this cause was a sham. Buffo, supra.

[4] The State of Alabama clearly presents a prima facie case and the trial

court correctly allowed the cause to go to the jury on counts 17 and 19 of the indictment in question.

IV

The appellant argues that reversible error occurred by allowing the State, after it had rested, to cross-examine a co-defendant, Mr. Redmond, who had elected to testify particularly with reference to the involvement of appellant Hayes, in the alleged scheme to defraud. See record pages 834-851.

[5] An analysis of this part of the record clearly shows that the State did not reopen its case as alleged by the appellant. There are only two or three slight references to the appellant, Hayes, throughout this part of the record. The trial judge instructed the jury that they should only consider that evidence with reference to Hayes which

was material to him and that the other evidence should be considered with reference to the co-defendant, Redmond. The trial judge carefully admonished the jury with reference to these matters. No error thus appears.

V

[6] Another issue argued by appellant involves certain evidence with reference to statements from Redmond and a witness which did not involve appellant. The trial court was very careful to instruct the jury that this evidence was related only to the co-defendant, Redmond, and was not to be considered as evidence against the appellant, Hayes. See record page 414. Due to the trial court's instruction, no error occurred. Rule 45, A.R.A.P.

[7] Moreover, because of Redmond's actions as set forth under Issue III in

this opinion, the State was trying this cause under the allegation of a general conspiracy. We are of the opinion that such evidence was also admissible to establish the actions of the principals in this cause, Daniels, Redmond and Hayes. See Conley v. State, 354 So.2d 1172 (Ala.Crim.App. 1977); Williams v. State, 383 So.2d 547 (Ala.Crim.App.1979), affirmed, 383 So.2d 564 (Ala. 1980) and Lewis v. State, 414 So.2d 135 (Ala.Crim. App.1982), cert. denied, 414 So.2d 140 (Ala. 1982). Thus, the admission of the evidence hereinabove noted was proper in this cause.

VI

The appellant next asserts that the admission of his statement into evidence without proper proof of the corpus delicti was error (R. 549) and, moreover, that there was no proof of

proper warnings under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

After the appellant raised the objection at trial that the State failed to proved the corpus delicti in this cause (R. 548-559), the State decided not to use the statement of appellant, Hayes. (R. 562). Therefore, Hartley's subsequent testimony made no mention of the appellant, Hayes. Moreover, no Miranda warnings were required because the appellant, Hayes, was not in custody at this time, and too, the corpus delicti had already been proven. The State correctly points these matters out in its brief.

VII

[8] The appellant argues next with reference to some five items which were admitted into evidence at various

points during the trial of this cause. (A) An argument with reference to the witness' examination of the records of Southern Heritage Life Insurance Company from January 1, 1977 through June 30, 1978. Because of the appellant's connection with Southern Heritage Life, that is, taking over as President of this corporation, there can be no doubt but that the records with reference to the financial condition just prior to the transactions, which were the basis of this indictment, were a proper inquiry. Such knowledge would be imputed to this appellant since he became President of Southern Heritage Life and was such during the time of the issuance of the two "Surplus Notes". The trial court's ruling in this respect was proper.

Next, the appellant objected to the introduction into evidence of

Exhibits 3 and 4 in paragraph B. This objection appears on Record 190. There is not a sufficient adverse ruling in this instance to preserve this issue for review. See Trawick v. State, 431 So.2d 574 (Ala.Crim.App.1983) and Ragsdale v. State, 448 So.2d 442 (Ala.Crim.App. 1984).

Similarly, we do not consider the appellant objection on Record 371 as to the evidence of capital and surplus status of American Fidelity Life Insurance Company as of December 31, 1979 to be well taken for the reasons herein stated. The same is also true as to how long American Fidelity Life Insurance Company had been in existence. (R.373).

Finally, the appellant objects to the introduction of evidence with reference to a meeting between the codefendant, Redmond, and Mrs. Sandoz in 1978. (R.219). It should be noted that

the trial court on Record 222, at the request of the appellant, instructed the jury that this testimony should be considered only with reference to the co-defendant, Redmond, and not the appellant, Hayes. Under these instructions, no error appears.

This court has carefully examined this record in light of all issues asserted on appeal. We find this record free of error. For the reasons stated, the judgment which was appealed from is due to be and is, hereby, affirmed.

AFFIRMED.

All the Judges concur.

Ex parte Andrew Wilson HAYES.

(Re Andrew Wilson Hayes, alias

v.

State).

85-1105.

Supreme Court of Alabama.

March 6, 1987.

Rehearing Denied May 8, 1987.

PER CURIAM.

WRIT QUASHED AS IMPROVIDENTLY GRANTED.

JONES, ALMON, SHORES, ADAMS and STEAGALL, JJ., concur.

TORBERT, C.J., and MADDOX, BEATTY and HOUSTON, JJ., dissent.

BEATTY, Justice (dissenting).

I would not quash the writ.

Petitioner, Andrew Wilson Hayes, was convicted on two counts of securities fraud as defined in § 8-6-17, Code of 1975. Specifically, Hayes was

charged with and convicted of selling two surplus notes on the Southern Heritage Life Insurance Company, of which he was president. The indictment alleged that Hayes had sold the notes with the knowledge that Southern Heritage Life Insurance Company's certificate of authority had been revoked by the Alabama Commissioner of Insurance, and that, therefore, the company could not engage in business which would enable it to acquire a capital surplus of $200,000, as required by the Alabama Department of Insurance, to validate the notes. The Court of Criminal Appeals affirmed. We granted certiorari to consider the correctness of that court's judgment. I would reverse and remand with directions.

Although Hayes asserts a number of arguments for reversal, we would

need to consider only one to decide this case. Specifically, I consider that a show of hands by the grand jury, taken in open court to confirm an earlier vote on the purported indictment by which Hayes was charged, with both the prosecuting attorney and the trial judge present, was illegal and requires reversal of the conviction.

The facts underlying this issue, as stipulated to by both counsel for the State and counsel for Hayes, are as follows:

The attorney general's office had drafted two indictments in this cause. One draft contained counts applicable to both Hayes and a co-defendant, Thomas Redmond; the other contained counts applicable only to the co-defendant. After an indictment had been presented by the foreman of the grand jury,

purportedly against both Hayes and his co-defendant, the grand jurors were allowed to leave the courtroom. However, before an order discharging the grand jurors had been entered, it was discovered by the trial judge that the indictment that had been signed was the one in which only co-defendant Redmond had been named. The jurors were called back to the courtroom and 16 of the grand jurors returned. Then, some form of hearing was held in court, with the grand jurors present. During that hearing, both the trial judge and the prosecutor asked the members of the grand jury which draft they had intended to return as an indictment. A show of hands confirmed that the jurors had intended to return the indictment which named both defendants. Thereafter, the grand jury foreman signed

the draft which named both Hayes and Redmond.

Hayes filed pretrial motions to dismiss this indictment, which were denied. After conviction, he appealed to the Court of Criminal Appeals, which affirmed. The Court of Criminal Appeals relied heavily on a stipulation between the State and Hayes in making its determination that "no improprieties in the presentment of this cause to the Grand Jury or in the presentation of the correct indic ment to the court by the Grand Jury in this cause [existed]." The Court of Criminal Appeals stated at 507 So.2d 982:

> "Following the conclusion of the hearing at which the State and the defendant each presented witnesses, the trial court made findings that in fact, a proper indictment had been returned and was in proper form and that this was the 'Hayes-Redmond indictment.' This

> was stipulated. See Record [, page 7] of Exhibit A, Supplemental Transcript.
>
> "In light of the stipulation which was filed and is a part of this record on appeal and the findings of the trial judge as to what actually transpired in the Grand Jury, this court finds no violation of any statute with reference to the Grand Jury proceedings in this State. See Sections 12-16-190 through 12-16-233, Code of Alabama 1975 as amended."

The reliance by both the majority of this Court and the Court of Criminal Appeals upon this stipulation is misplaced.

The stipulation provided, in pertinent part: "At the conclusion of the hearing at which the Defendant and the State presented witnesses, the Court made a finding of fact and ruled as a matter of law that a proper true bill had been returned on the HAYES-REDMOND indictment."

By the above stipulation, the parties clearly intended to stipulate only to the fact that the trial court had made a "finding" that the indictment was proper. They did not stipulate that the trial court's finding was correct. Indeed, this stipulation was made for the express purpose of establishing a record of these grand jury proceedings so as to allow their review on the defendant's appeal from the conviction obtained on the indictment at issue. The parties intended to facilitate review of the very error that both the Court of Criminal Appeals and the majority of this Court have essentially held to have been waived. I do not place such a labored construction upon the language of this stipulation. The defendant is entitled to have this error reviewed. Cf. Echols v. Star Loan Co.,

290 Ala. 76, 274 So.2d 51 (1973).

Beyond the fact that the language of the stipulation at issue has been incorrectly construed by both the Court of Criminal Appeals and by the majority of this Court, it is clear that the result in this case has been reached without considering whether it is, indeed, possible to "waive" the error which exists in this case.

It has long been recognized in Alabama that although objections as to the form of an indictment may be waived, an objection as to a defect of "substance" cannot be waived. Carruth v. State, 23 Ala.App. 113,121 So. 498 (1929); Allen v. State, 30 Ala.App. 147, 2 So.2d 320, rev'd on other grounds, 241 Ala. 137, 2 So.2d 321 (1941); Carr v. State, 22 Ala.App. 415, 1 6 So. 903, cert. denied, 217 Ala. 516, 116 So. 905 (1928).

See generally, 42 C.J S. Indictments and Informations § 301(1944).

Code of 1975, § 12-16-209, expressly provides that the prosecutor "must not be present at the expression of their [the grand jurors'] opinions or the giving of their votes on any matter before them." (Emphasis added.)

Further, Code of 1975, § 12-16-214, declares:

> "The legislature hereby finds, declares and determines that it is essential to the fair and impartial administration of justice that all grand jury proceedings be secret and that the secrecy of such proceedings remain inviolate. [Emphasis added.] The provisions of this division are to be construed for the accomplishment of this purpose and to promote the following:
>
> "(1) That grand juries have utmost freedom in their discussions, deliberations, considerations, debates, opinions and votes without fear or apprehension that the same may be subsequently discosed, or that they may be

subject to outside pressure or influence or injury in their person or property as a result thereof.

"(2) That those persons who have information or knowledge with respect to the commission of crimes or criminal acts be encouraged to testify freely and truthfully before an appropriate grand jury without fear or apprehension that their testimony may be subsequently disclosed, or that they may be subject to injury in their person or property as a result thereof.

"(3) That those persons who have committed criminal acts or whose indictment may be contemplated not escape or flee from the due administration of justice.

"(4) That those persons falsely accused of criminal acts are not subject to public scrutiny or display and their otherwise good names and reputations are left intact."

The language of § 12-16-209 is clearly mandatory. Thus, if the requirements of the section are not met, the indictment returned will not

support a conviction. See Goulden v. State, 53 Ala.App. 278, 299 So.2d 323, aff'd, 292 Ala. 704, 299 So.2d 325 (1974 . Further, it cannot be said that such an error is not one of "substance," when the legislature has declared of grand jury secrecy that "it is essential to the fair and impartial administration of justice."

The above Code sections and the policies behind them have been violated. The indictment at issue cannot support a conviction. The judgment of the Court of Criminal Appeals should be reversed.

TORBERT, C.J., and MADDOX and HOUSTON, JJ., concur.

EXHIBIT A

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

STATE OF ALABAMA *

vs. * CRIMINAL CASE NO. CC 83-567

ANDREW WILSON HAYES, *

Defendant. *

STIPULATION OF COUNSEL

Counsel for the State of Alabama, Honorable Patrick Robinson, and counsel for the Defendant, Christopher Knight, hereby stipulate on behalf of both parties that the following facts surrounding the presentation of this case to the grand jury are true and correct and that said facts may be used to supplement the record on appeal in this case in leiu of a transcript of the proceedings which took place on hearing of a pretrial motion filed by the Defendant seeking to dismiss the indictment

due to alleged improprieties surrounding the presentation of this case to the grand jury:

1. The Attorney General's Office drafted two (2) indictments in this case for possible presentation to the Grand Jury. (The first indictment contained nineteen (19) counts of which five (5) counts pertained to the defendant HAYES and fourteen (14) counts pertained to the defendant REDMOND. This nineteen (19) count indictment will hereinafter be referred to as the HAYES-REDMOND indictment. The second indictment contained fourteen (14) counts pertaining only to the defendant REDMOND and that draft indictment will hereinafter be referred to as the REDMOND indictment. The fourteen (14) counts pertaining to REDMOND in both the HAYES-REDMOND and REDMOND

indictments are identical.

2. Evidence pertaining to the HAYES-REDMOND indictment was presented to the grand jury from approximately 2:00 P.M. to 7:00 P.M. on October 27, 1983. Seven (7) witnesses including the defendant HAYES appeared before the grand jury. Scores of documents were presented to the grand jury. There is no doubt but that the grand jury had before it sufficient evidence upon which to return a true bill on the HAYES-REDMOND indictments.

3. Due to the late hour it was decided to let the grand jury vote on the morning of October 28, 1983. At approximately 8:30 A.M. on October 28, 1983, the HAYES-REDMOND indictment was presented to the grand jury. The prosecutor, PAT ROBINSON, handed what he thought to be the HAYES-REDMOND

indictment to the foreman of the grand jury, MARY NORTHCUTT. ROBINSON, using a copy of the HAYES-REDMOND indictment explained each count in the indictment to the grand jury.

4. ROBINSON then told the grand jury that they should vote on the HAYES-REDMOND INDICTMENT. ROBINSON told the grand jury that they should return a no bill if they were not satisfied as to each and every one of the nineteen (19) counts. ROBINSON also informed the grand jury that if they wished to indict REDMOND but did not wish to indict HAYES that they should no bill the indictment and a separate REDMOND indictment would be presented to the grand jury for their consideration subsequent to their vote on the HAYES-REDMOND indictment. (This was the first and only mention in the presence of the

grand jury that the REDMOND indictment even existed). The prosecutors then left the room and the grand jury voted on the HAYES-REDMOND indictment. There is absolutely no doubt that the grand jury had before it the HAYES-REDMOND indictment only.

5. Approximately three (3) or four (4) minutes after leaving the grand jury room the prosecutors were asked to return to the grand jury room. The prosecutors were informed by the grand jury that a true bill had been returned on the HAYES-REDMOND indictment. There was no doubt in anyone's mind that the grand jury had voted to indict both HAYES and REDMOND in a joint indictment. It is assumed that the grand jury minute book will reflect that only the HAYES-REDMOND indictment was considered and that a true bill was

returned on that indictment.

6. At approximately 1:30 P.M. on October 28, 1983, the grand jury returned the indictments to JUDGE WILTERS in open court. JUDGE WILTERS thanked the grand jury for performing its civic duty and instructed the members of the grand jury to proceed to the Circuit Clerk's office in order to be paid. no time did JUDGE WILTERS orally "discharge" the grand jury. JUDGE WILTERS did not issue any written order "discharging" the grand jury. The grand jury remained impaneled until the expiration of its term and was subject to the call of the presiding judge JUDGE WILTERS.

7. Approximately two (2) or three (3) minutes after the members of the grand jury left the courtroom it was discovered that the HAYES-REDMOND

indictment was not in the stack of indictments but rather the REDMOND indictment was in the stack and the REDMOND indictment had been endorsed as a true bill by MRS. NORTHCUTT. (The State is not sure how this anomaly occurred but it is assumed that on the morning of October 28, 1983, the prosecutor ROBINSON handed MRS. NORTHCUTT the draft REDMOND indictment and that everyone, including ROBINSON and MRS. NORTHCUTT, was under the false impression that ROBINSON had handed MRS. NORTHCUTT the HAYES-REDMOND indictment.

8. Upon the discovery that MRS. NORTHCUTT had endorsed the wrong indictment, ROBINSON so informed JUDGE WILTERS. JUDGE WILTERS immediately called the Circuit Clerk's office and instructed that all members of the grand jury return to his courtroom at

once. ROBINSON also went to the Circuit Clerk's office and related JUDGE WILTERS' instruction to some members of the Grand Jury.

9. Sixteen (16) of the members of the grand jury, including MRS. NORTHCUTT, reconvened in JUDGE WILTERS' courtroom at approximately 1:45 P.M. on October 28, 1983. These Sixteen (16) grand jurors were adamant that the grand jury had voted a true bill on the HAYES-REDMOND indictment. After JUDGE WILTERS was satisfied that a mistake had been made and the wrong indictment had been endorsed he told the grand jurors that all of them but MRS. NORTHCUTT could go home. He explained that it would be necessary for MRS. NORTHCUTT to remain in order to endorse the HAYES-REDMOND indictment. The reason that JUDGE WILTERS did not allow MRS. NORTHCUTT

to endorse the HAYES-REDMOND indictment then and there was because JUDGE WILTERS wanted the last page, page 20, retyped in order to provide an adqueate space to set each defendant's bond.

10. Before the grand jurors left the room and in the presence of JUDGE WILTERS, the prosecutor ROBINSON again asked the grand jurors if they had indicted both HAYES and REDMOND to which they each and every one responded affirmatively. ROBINSON then asked the grand jurors if they wanted MRS. NORTHCUTT to endorse the HAYES-REDMOND indictment to which they each and every one responded affirmatively. ROBINSON then told the grand jurors that if anyone has an objection to or a problem with the manner in which this matter was being corrected to please state their objection. No one responded

to this inquiry. All of the grand jurors then left except MRS. NORTHCUTT. All of the aforementioned activity took place in open court.

11. Approximately three (3) or four (4) minutes after the departure of the grand jury, JUDGE WILTERS' secretary finished retyping page 20 of the HAYES-REDMOND indictment in order to allow the Judge an adequate space to set the bonds on each defendant. MRS. NORTHCUTT then looked over the HAYES-REDMOND indictment and endorsed it a true bill. MRS. NORTHCUTT again affirmed that the grand jury had considered the HAYES-REDMOND indictment and had voted to return a true bill on the HAYES-REDMOND indictment. MRS. NORTHCUTT also again affirmed that the grand jury had not considered nor had it voted on the REDMOND indictment.

12. The HAYES-REDMOND indictment was was then processed by the Circuit Court Clerk's office. The HAYES-REDMOND indictment was the first indictment processed by the Circuit Clerk's office.

13. The REDMOND indictment was not processed as it was determined by JUDGE WILTERS, in the presence of and with the concurrence of the prosecutors and MRS. NORTHCUTT, that the REDMOND indictment could not possibly be a valid indictment as it was not even considered, much less voted on, by the grand jury. The prosecutor ROBINSON retained the RED-MOND indictment and it is in his custody and under his control.

14. At the hearing on the motion filed by the Defendant to dismiss the indictment due to alleged improprieties surrounding the presentation of the case to the grand jury, counsel for the

Defendant called MRS. NORTHCUTT as a witness to testify regarding the aforementioned proceedings and other proceedings before the grand jury in this case. MRS. NORTHCUTT testified in a manner generally consistent with paragraphs 1-13 of this Stipulation. However, the Court sustained an objection by the State to any testimony by MRS. NORTHCUTT regarding the actual substance of grand jury witnesses testimony on the ground that the grand jury proceedings were secret. Counsel for the Defendant reserved an exception to the Court's ruling.

15. At the conclusion of the hearing at which the Defendant and the State presented witnesses, the Court made a finding of fact and ruled as a matter of law that a proper true bill had been returned on the HAYES-REDMOND

indictment.

IT IS SO STIPULATED.

original signed
PATRICK L. ROBINSON
Assistant Attorney
General
Attorney for the Appellee
64 North Union Street
Montgomery, Alabama 36104

original signed
CHRISTOPHER KNIGHT
Attorney for the
Appellant
255 Saint Francis Street
Mobile, Alabama 36602

EXHIBIT B

IN THE CIRCUIT COURT OF BALDWIN COUNTY

ALABAMA

STATE OF ALABAMA :

vs. : Case No. 83-567

ANDREW WILSON HAYES, :

Defendant. :

AMENDMENT TO STIPULATION

Come now the parties, by and through counsel, and hereby amend the stipulation heretofore filed in this cause to add the following paragraph:

16. During the hearing on the motion filed by the Defendant to dismiss the indictment due to alleged improprieties surrounding the presentation of the case to the grand jury, MR. HAAS, attorney for the Defendant, called MRS. NORTHCUTT to the stand and, in addition to questions about which indictment the grand jury intended to return, attempted to elicit testimony from her regarding the manner

in which the prosecutors presented the case to the grand jury, and whether or not the prosecutors in any way persuaded the grand jurors by way of active advocacy or even coercion to return an indictment against HAYES. The trial court disallowed testimony along these lines, sustaining an objection by the State, to which MR. HAAS duly excepted. MR. HAAS likewise offered to call as witnesses other grand jurors to testify regarding the manner in which the case was presented to them and whether or not they were persuaded or coerced into returning an indictment against HAYES. The Court once again disallowed testimony regarding the manner in which the case was presented to the grand jury and whether the grand jurors were persuaded or coerced into returning the indictment against HAYES, and no further witnesses were called. MR. HAAS also called PATRICK L. ROBINSON, one of the prosecutors to the stand, and

when asked whether he or any of the other prosecutors attempted to persuade or coerce the grand jurors into returning an indictment against HAYES, the Court sustained an objection to such testimony and would not allow MR. HAAS to continue along this line of questioning. The Court gave defense counsel an exception to its ruling regarding the admissibility of this testimony. MR. HAAS was restricted to eliciting testimony regarding only whether or not the grand jury intended to indict HAYES and whether the HAYES-REDMOND indictment was, in fact, the indictment which they intended to return.

original signed

GEORGE N. HARDESTY, JR.
Assistant Attorney General
250 Administrative Bldg.
64 N. Union Street
Montgomery, Alabama
36130

original signed

CHRISTOPHER KNIGHT
Attorney for Defendant
255 St. Francis Street
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ORDER

It is ORDERED that the Amendment to Stipulation hereinabove set forth be made a part of the Record on Appeal and that the Record be supplemented to include this Amendment. The Clerk of the Circuit Court shall notify counsel for all parties when the record is so supplemented and forward this supplement to the Clerk of the Court of Criminal Appeals for inclusion in the Record on Appeal. It is further ORDERED that the time for filing briefs shall begin to run when the record is so supplemented.

IT IS SO ORDERED.

DONE at Opelika, Alabama this ____ day of August, 1985.

original signed

GEORGE H. WRIGHT, JR.
CIRCUIT JUDGE, SITTING BY
DESIGNATION